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No. 07-31

IN THE

Supreme Court of the United States

EDGAR DIAZ AND EMILE FORT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
REPLY FOR PETITIONERS 1
CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Becker v. Montgomery, 532 U.S. 757 (2001) 6
Bell Atl. Corp. v. Twombly, __ U.S. __, 127 S. Ct.1955 (2007) 2
Cent. Bank v. First Interstate Bank, 511 U.S. 164 (1994) 2
Crosby v. United States, 506 U.S. 255 (1993) 6
Davis v. United States, 411 U.S. 233 (1973) 6
Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964) 2, 3
Gozlon-Peretz v. United States, 498 U.S. 395 (1991) 7
Hanna v. Plumer, 380 U.S. 460 (1965) 6
Hickman v. Taylor, 329 U.S. 495 (1947) 3
Jaben v. United States, 381 U.S. 214 (1965) 6
Kyles v. Whitley, 514 U.S. 419 (1995) 5
Mallory v. United States, 354 U.S. 449 (1957) 6
Mazurek v. Armstrong, 520 U.S. 968 (1997) 2
Nixon v. Fitzgerald, 457 U.S. 731 (1982) 3
Russello v. United States, 464 U.S. 16 (1983) 7
Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977) 2
Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963) 6
United States v. Armstrong, 517 U.S. 456 (1996) 8
United States v. Nobles, 422 U.S. 225 (1975) 6
United States v. Robinson, 361 U.S. 220 (1960) 4

Statutes & Rules

FED. R. CIV. P. 12(b)(6) 2
FED. R. CRIM. P. 4 6
FED. R. CRIM. P. 5(a) 6
FED. R. CRIM. P. 6(e)(3)(A)(ii) 7
FED. R. CRIM. P. 12 6
FED. R. CRIM. P. 16(a)(2) 1, 4, 6, 7, 8, 9, 10
FED. R. CRIM. P. 16(d)(1) 9, 10

TABLE OF AUTHORITIES
(Continued)

Page

FED. R. CRIM. P. 16 advisory committee's note (1974 Amendment) 6, 8
FED. R. CRIM. P. 43 6

Miscellaneous

ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE (8th ed. 2002) 2, 9
17 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 4036 (2d ed. 1988 & Supp. 2007) 2

REPLY FOR PETITIONERS

The issue in this case is whether Federal Rule of Criminal Procedure 16(a)(2)'s work product exemption applies to reports prepared by a local police department without any showing that the police had an actual agency relationship with the federal officials when the police prepared the reports. A divided panel of the United States Court of Appeals for the Ninth Circuit answered "yes" to that question. As the Petition demonstrated, the Ninth Circuit's decision ignores the plain text of Rule 16(a)(2), which requires an agency relationship, not simply that the reports have been prepared by government personnel without any federal involvement or direction and then later handed over to federal prosecutors. Furthermore, the Petition demonstrated that this case presents an ideal vehicle for resolving this important and recurring issue regarding the interpretation of the Federal Rules of Criminal Procedure, an area of law that this Court has identified as in particular need of national uniformity. Pet. at 18-22.

The government does not seriously contest most of these points. It is no answer for the government to merely intone the conclusion that "[f]urther review is not warranted" because there is no "circuit conflict." Opp. at 7, 8. As the Petition explained, this is not an issue that is likely to produce frequent appeals to the circuit courts, even though the issue arises frequently in district court proceedings. Pet. at 21-22. Furthermore, waiting for additional circuit case law to correct the Ninth Circuit's erroneous decision requires either the appeal of the potentially unfair conviction of a defendant denied discovery, or a costly extraordinary writ or interlocutory appeal by the government, as was done in this case. *Id.* The Court need not wait for another case, for the issue is squarely presented here and has been fully illuminated by the court below, including at the *en banc* stage. Given that the interpretation of Rule 16(a)(2) presents a pure question of law involving statutory interpretation,

certiorari should be granted to correct the Ninth Circuit's error.

1. As a preliminary matter, the government's contention that the interlocutory posture of this case makes this Court's review unwarranted, Opp. at 7, is unavailing. While the interlocutory nature of a case may be *relevant* to assessing the appropriateness of immediate review, it is not *dispositive*. *See Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997) ("[O]ur cases make clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts," in particular where "the Court of Appeals' decision was clearly erroneous . . . .") (citations omitted); *see also* 17 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 4036, at 10 (2d ed. 1988 & Supp. 2007) ("[T]here is no requirement that there be a 'final' decision; once a case has come to be in the court of appeals, the Supreme Court may grant certiorari to review interlocutory decisions.").

Where, as here, an important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari is presented, the case may be reviewed despite its interlocutory status. *See Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 153 (1964). This is particularly true where the court below has decided an important issue, otherwise worthy of review, and this Court's "intervention may serve to hasten or finally resolve the litigation." ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE § 4.18, at 260 (8th ed. 2002) (citing, *inter alia*, *Cent. Bank v. First Interstate Bank*, 511 U.S. 164 (1994), and *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977)); *see also Bell Atl. Corp. v. Twombly*, __ U.S. __, 127 S. Ct. 1955 (2007) (granting certiorari and deciding the case after reversal by the Second Circuit of the district court's dismissal on Rule 12(b)(6) grounds).

Here, the final resolution of this important discovery issue will impact the litigating position of the parties in this death penalty case and the parties' determination whether to reach

a plea agreement or to go ahead with a full trial. Indeed, the government itself sought interlocutory review in this case. If the importance of the decision below were "unclear" or hypothetical, *see* Opp. at 8, then the government would not have taken this extraordinary step.

Furthermore, it makes no sense to abstain from resolving this case now in hopes of later correcting any error after a full trial and second round of appeals. At that point, the prejudicial effect of the instant discovery dispute may be difficult to prove. "Moreover, delay of perhaps a number of years in having the [] rights determined might work a great injustice . . . so long as the [lower court's] ruling stands." *Gillespie*, 379 U.S. at 153. As the Petition demonstrated, the legal issue in this case is squarely presented and the Court's decision will guide the discovery process, both in this case and in others. Pet. at 21-22. The Court should thus hear the case now. *See Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982) ("The [] question is a pure issue of law, appropriate for our immediate resolution. Especially in light of the Court of Appeals' now-binding decision of the issue presented, concerns of judicial economy fully warrant our decision of the important question presented.").

2. That there is no circuit split at present does not diminish the Petition's showing that this is an important and recurring question of law appropriate for the Court's immediate review. The government does not dispute that discovery disputes of the sort implicated here are generally not appealable. *See* Pet. at 21-22. Nonetheless, a substantial number of criminal cases will be affected by the Ninth Circuit's erroneous construction, as demonstrated by the number of district court decisions that have addressed the issue and as confirmed by the amicus brief submitted by the NACDL and Federal Public Defenders. In such situations, this Court has routinely granted certiorari. *See, e.g.*, *Hickman v. Taylor*, 329 U.S. 495, 500 (1947) (illustrating that the Court will act under its supervisory authority to correct an error in interpreting the Federal Rules of Civil

Procedure, even when there is only a "divergence of views among district courts").

The government itself, effectively conceding the importance of the question presented, avers that one of the "realities" in our criminal justice system "is that information provided by state and local police officers is *often integral* to the prosecution of federal crimes." Opp. at 15 (emphasis added). That reality means that the issue presented here will arise frequently in criminal cases. In the Ninth Circuit, such cases will be governed by a plainly erroneous construction of the Federal Rules. In other circuits, the law will remain unsettled, with the district courts having reached conflicting results, creating disunion and uncertainty in an area where the whole point of the Federal Rules of Criminal Procedure is the uniform administration of justice. *See, e.g.*, *United States v. Robinson*, 361 U.S. 220, 222 (1960) ("Because of the importance of the question to the proper and uniform administration of the Federal Rules of Criminal Procedure, we granted certiorari."). Because the Ninth Circuit's ruling is in conflict with the general theory of agency, allowing it to stand, unreviewed, will lead to inconsistent application of, and confusion over, the intent and meaning of Rule 16(a)(2).

This is not a "limited . . . disagreement between the court of appeals majority and dissent in this case." Opp. at 9. It is, rather, a fundamental disagreement about what Congress meant by the word "agent" in Rule 16(a)(2). By requiring that the materials at issue have been prepared by agents of the federal government—*i.e.*, persons acting as authorized and directed by federal officials, not simply local police officers acting independently who later turn over their reports—the drafters ensured that the Rule would further the basic purpose of the work product exception of sheltering the mental processes of an attorney and protecting material prepared by an attorney or his agents. The Rule's reference to "internal government documents," FED. R. CRIM. P. 16(a)(2), shows that the Rule is directed towards protecting documents prepared by the federal government, or their

agents, that reflect federal government thinking, investigative strategy, and the like. The Ninth Circuit majority's erroneous interpretation expands the exemption far beyond that limited purpose. The reach of this decision will not be limited. Under the Ninth Circuit's interpretation of agency, federal prosecutors will be able to shield from discovery documents that Congress determined were discoverable, which has the potential to affect as much as 60% of cases in the Ninth Circuit, and many more cases beyond. Pet. at 19-20. The practical impact of this disagreement is far-reaching, not limited.

It is no answer to assert that "prosecutors often voluntarily provide defendants with materials," Opp. at 10, not required under the Federal Rules. The government does not typically and cannot be counted on generally to voluntarily disclose material that it is otherwise not required to disclose under the Federal Rules. *See Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995) (noting that a *Brady* claim can arise where the "Government failed to volunteer exculpatory evidence never requested, or requested only in a general way"). This case itself illustrates that the government cannot be counted on to voluntarily disclose information in an appropriate fashion, or even to disclose information deemed discoverable by a district court. Here, the government contended that the redacted information was adequate notwithstanding a federal district court's determination that more was required to enable defendants to defend themselves against the government's request that they be put to death.

Finally, our adversarial system, and the promise of justice for defendants, cannot depend on goodwill alone to function effectively. It must, as the Federal Rules and decisions of this Court show, depend on the rule of law and a system of rules designed to effectuate justice. "The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that

compulsory process be available for the production of evidence needed either by the prosecution or by the defense." *United States v. Nobles*, 422 U.S. 225, 231 (1975) (internal quotation marks omitted; emphasis added); *see also* FED. R. CRIM. P. 16 advisory committee's note (1974 Amendment) (noting that the Rule was adopted "in the view that *broad discovery* contributes to the fair and efficient administration of criminal justice") (emphasis added).

3. The alternative of amending the Federal Rules to correct the Ninth Circuit's erroneous ruling is not appropriate here. If that approach were correct, the Court would never grant certiorari in any case involving a misconstruction of any of the Federal Rules, or even most agency decisions. But, of course, this Court does grant certiorari in such cases where, as here, uniformity is at stake. *See, e.g.*, *Hanna v. Plumer*, 380 U.S. 460, 462-63 (1965) ("Because of the threat to the goal of uniformity of federal [civil] procedure posed by the decision below, we granted certiorari.") (footnote omitted); *Becker v. Montgomery*, 532 U.S. 757, 762 (2001) ("We granted certiorari . . . to assure the uniform interpretation of the governing Federal Rules.") (internal citation omitted); *see also, e.g.*, *Mallory v. United States*, 354 U.S. 449, 451 (1957) (interpreting Federal Rule of Criminal Procedure 5(a)); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 343 (1963) (interpreting Federal Rule of Criminal Procedure 12); *Jaben v. United States*, 381 U.S. 214, 217 (1965) (interpreting Federal Rules of Criminal Procedure 4 and 5); *Davis v. United States*, 411 U.S. 233, 240 (1973) (interpreting Federal Rule of Criminal Procedure 12); *Crosby v. United States*, 506 U.S. 255, 257 (1993) (interpreting Federal Rule of Criminal Procedure 43). The problem in this case is not that the Federal Rules need amending, but that the Ninth Circuit did not apply Rule 16(a)(2) as written. The very suggestion that rulemaking should be considered is effectively a concession that the result reached by the Ninth Circuit is incorrect.

4. Finally, the government's defense of the decision below is plainly wrong as a matter of law.

a. The government erroneously read the term "government agent" to mean "any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government." Opp. at 12. If Congress had meant for the term "government agent" in Rule 16(a)(2) to mean "any government personnel" as provided in Rule 6(e)(3)(A)(ii), Congress would have said so by using the same language. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship."). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (internal quotation marks omitted). In this case, Congress' use of the limited term "government agent," instead of the more general and inclusive terms "any government personnel," shows that Congress rejected the Ninth Circuit's expansive interpretation of the rule as extending to local police departments acting independently of the federal prosecutors.

b. In an even further stretch, the government avers that "[w]hether or not the local police officers were acting as federal 'agents' when they drafted the reports, they were acting as such when they shared the reports with the federal authorities." Opp. at 12-13. Under that reading of the statute, physical possession by the government alone would be sufficient to shield these documents from discovery. Everything in the government's possession would be work product by virtue of having been given to the government by another person or entity, whether or not that person or entity was an agent. That is not what the Rule says.

This is all just word games by the government. The term "agent" in the Rule requires an agency relationship at the time the reports were made. And, it would not be enough, as the government contends, to merely incorporate the substance of pre-existing documents into newly created documents if and when a local police department were to become an agent of the federal government. *See* Opp. at 13. Even if these later-prepared documents—whose only purpose would be to avoid discovery—were subject to Rule 16(a)(2)'s exception, the documents relied upon to prepare them would not be, under an appropriate construction of the Rule.

c. The government's claim that Rule 16 departs from and is broader than work product, Opp. at 14, is unsupportable. The Advisory Committee notes make clear that Rule 16 "[s]ubdivision (a)(2) is . . . included to make clear that the *work product* of the government attorney is protected." FED. R. CRIM. P. 16 advisory committee notes (1974 Amendment) (emphasis added). And, as this Court has explained, a defendant under Rule 16(a)(2) "may not examine Government *work product* in connection with his case." *United States v. Armstrong*, 517 U.S. 456, 463 (1996) (emphasis added).

Nor is the government's position aided by the Ninth Circuit's ruling that the police reports here were prepared in "connection" with the "case." Under the government's and the Ninth Circuit' view, any document that might lead to evidence in a "case" is a document prepared in connection with the case. *See* Opp. at 14. The plain language of the rule, however, requires not only that the document have been prepared in connection with the case but that it have been prepared by a federal attorney or agent of the federal government. The point of the Rule is not, as the government contends, to subsume every piece of paper or other document prepared in the course of unrelated police work that may later become part of the "case," but only those materials that were prepared by the federal government or its agents.

d. It is not enough for the government to contend that a prosecutor's *Brady* obligations will not be implicated simply because the two judges in the majority believed that the case would not be extended to this area. Opp. at 14-15. As Judge Wardlaw explained, "[t]he extension of *Brady* to knowledge not personally held by the prosecutor has been driven by theories of government agency." Pet. App. 13a (Wardlaw, J., dissenting from denial of rehearing en banc). Given that *Brady* and Rule 16 "are in many ways two sides of the same coin," *id.*, there is a very real possibility that the erroneous interpretation of government agent here will later rework the government's obligations under *Brady*.

e. Finally, the government's assertion that federal/state law enforcement efforts will be hampered, Opp. at 15, is unsupportable. The government does not even attempt to show how a decision reading the Rule in the way it was written would impair federal and state efforts to prosecute crimes. The government relies only on the overstated and unsupported claim that such a reading would "burden[] the provision of information . . . with a risk of disclosure that could imperil witnesses or damage investigations and prosecutions." *Id.* To the extent the government is concerned about the safety of witnesses or the protection of investigative materials, its remedy is a protective order under Rule 16(d)(1), and not a constructive amendment of Rule 16(a)(2). *See* Pet. App. 49a (Fletcher, J., dissenting).

* * *

At bottom, this case presents the Court with a straightforward case of legal error, so straightforward, in fact, that the Court may wish to consider summary disposition. *See* SUPREME COURT PRACTICE, *supra*, § 5.12, at 315-16 (noting that summary reversal "often reflects the feeling of a majority of the Court that the lower court result is so clearly erroneous . . . that full briefing and argument would be a waste of time"). The case raises an important and recurring issue implicating the Federal Rules of Criminal

Procedure, which by their very nature call out for a uniform interpretation throughout the federal courts. There are no significant vehicle issues that counsel against the Court's review.

As explained by the dissent below, "[t]he government seeks to use Federal Rule of Criminal Procedure 16(a)(2), which protects work product, to serve the purposes of Rule 16(d)(1), which protects witnesses. . . . Despite its claim that the entire reports are protected as work product [], the government is willing to hand them over after redaction. But it insists that Rule 16(a)(2) allows it to redact names and identifying information. The government and the majority misunderstand and therefore misuse Rule 16(a)(2)." Pet. App. 47a, 49a (Fletcher, J., dissenting).

This Court should not sanction such a patent misuse of Rule 16(a)(2). There is no reason why this Court's immediate review should be delayed to correct this plainly erroneous decision.

CONCLUSION

For these reasons, and those stated in the Petition, certiorari should be granted.

Respectfully submitted,

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